STATE OF MICHIGAN

COURT OF APPEALS

L. DUANE COPELAND, STEPHEN M. ZERVOS, and MARY M. SECHRIST,

Plaintiffs-Appellants,

v

GENOA TOWNSHIP, NEW PAR d/b/a VERIZON WIRELESS, VERIZON WIRELESS (VAW) LLC, and VILLAS OF OAK POINTE ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
June 30, 2011

No. 301442
Livingston Circuit Court
LC No. 10-024988-CZ

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs, L. Duane Copeland, Stephen M. Zervos, and Mary M. Sechrist, appeal as of right the trial court's order denying them summary disposition, pursuant to MCR 2.116(C)(10), granting defendant, Genoa Township, summary disposition, pursuant to MCR 2.116(C)(10), and granting defendants, New Par d/b/a Verizon Wireless, Verizon Wireless (VAW) L.L.C. (Verizon), and the Villas of Oak Pointe Association (the Association), summary disposition, pursuant to MCR 2.116(I). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs are owners of neighboring units in a residential condominium project called the Villas of Oak Pointe (the Villas), built in 1997. When the Villas were developed, Delcor Homes, the developer, recorded a master deed. A subdivision plan and bylaws were incorporated into the master deed by reference. The subdivision plan contained legal descriptions of where easements exist within the Villas. One of the easements was entitled "Easement for Public Utilities (Water Tower Easement)." Genoa Township thereafter built a water tower on this easement. The water tower serves the water needs of the public along with the water needs of persons residing in the Villas.

In approximately June 2009, Genoa Township negotiated a five-year lease agreement with New Par to be executed by Verizon. The lease was to convey to New Par a leasehold interest in the space atop and alongside the water tower upon which to erect "communications equipment, antennas and appurtenances." The lease was also to convey land space within the

water tower easement for the installation of a 750 square foot accessory building, which was necessary to house equipment, including a backup generator, related to the wireless communications antennae. The building was proposed to be 16 feet tall.

In January 2010, plaintiffs filed a declaratory action and requested injunctive relief in order to prevent Genoa Township from executing a lease whereby New Par and Verizon would be allowed to construct telecommunications antennae and an accessory building on an easement for public utilities in the Villas. After cross-motions for summary disposition were filed by plaintiffs and Genoa Township, the trial court found that the telecommunications antennae and accessory building were within the meaning of "public utility" as set forth in the deed and that the accessory building was not inconsistent with the Villas' bylaws. Thus, the trial court granted defendants summary disposition and denied plaintiffs summary disposition.

Plaintiffs moved for reconsideration, pursuant to MCR 2.119(F). On November 16, 2010, the trial court entered an opinion and order denying plaintiffs' motion for reconsideration and clarifying that the telecommunications equipment that New Par and Verizon wanted to build was within the meaning of "public utility" and was not inconsistent with that easement. In addition, the trial court reiterated that it granted defendants summary disposition, denied plaintiffs' motion for summary disposition, and dismissed plaintiffs' claims for declaratory judgment and injunctive relief. Plaintiffs now appeal.

II. MOTIONS FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A motion for summary disposition is reviewed de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, we consider the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion, *Coblentz*, 475 Mich at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law, summary disposition should be granted. MCR 2.116(C)(10). MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." "The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

B. ANALYSIS

Plaintiffs argue that the trial court erred in determining that the telecommunications services to be provided by New Par and Verizon amounted to a public utility and that New Par and Verizon were entitled to lease the easement for public utilities. We disagree. Based on the plain and unambiguous language in article IV of the deed, we conclude that the "Easement for Public Utilities (Water Tower Easement)" includes utilities for telephone and telecommunications systems and their supporting equipment. Moreover, the bylaws make clear that those utilities could be provided by a private company.

"When interpreting deeds and plats, Michigan courts seek to effectuate the intent of those who created them." *Tomecek v Bavas*, 482 Mich 484, 490-491; 759 NW2d 178 (2008). When the language of an easement is plain, "it must be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). If the text of the easement is ambiguous, extrinsic evidence may be considered to determine the scope of the easement. *Dyball v Lennox*, 260 Mich App 698, 704; 680 NW2d 522 (2003).

The language concerning easements for maintenance of utilities in the master deed reads as follows:

> There shall be easements to, through and over the land in the Condominium (including all United and limited common element extended yard areas) for the continuing maintenance, repair, replacement and enlargement of any *general common element utilities* in the Condominium as depicted on the Condominium Subdivision Plan as the same may be amended from time to time. [Emphasis added.]

The condominium subdivision plan labeled the easement at issue an "Easement for Public Utilities (Water Tower Easement)." Plaintiffs contend that New Par and Verizon and their telecommunications services do not amount to a public utility and, as a result, they cannot use the water tower easement to place antennae to provide wireless cellular services and build an accessory structure for the antennae. We disagree.

The master deed, the subdivision plan and the bylaws fail to define "public utility." However, the master deed and the bylaws evidence the intention of the developer that a public utility easement, as labeled in the subdivision plan, includes telephone and telecommunications services such as those provided by New Par and Verizon. Article VII, section four, of the master deed indicates that the easements reserved by the developer for utility mains include "water, gas, *telephone*, electrical, cable television, storm and sanitary sewer mains." (Emphasis added.) This definition of utility, therefore, encompasses the wireless telephone services provided by Verizon. Moreover, the water tower easement is a general common element as defined in Article IV, section F, of the master deed. Other general common elements include "[a] telecommunications system, if and when it may be installed, including any security system up to the point of the ancillary connection for Unit service." Such a telecommunications system also encompasses the

services of New Par and Verizon, which are extraneous to other telephone connections. Further, in Article VIII, section 14, of the bylaws, underground utilities in the subdivision such as "water mains, sanitary sewers, storm sewers, gas mains, electric and *telephone distribution lines*, cable television lines, and all connections to the same" and "above-ground electric and *telephone utility* installations and distribution systems" can be provided by a "private" entity. (Emphasis added.) The definition of "public utility" does not have any other meaning; nowhere in the master deed, the subdivision plan or the bylaws does it state that a public utility easement at the Villas cannot include wireless telecommunications systems like those provided by New Par and Verizon. Accordingly, the master deed plainly and unambiguously provides that public utilities include telephone and telecommunications services, even those provided by private companies. Therefore, the trial court's finding that the wireless telecommunication services of New Par and Verizon are a public utility under the deed was not clearly erroneous.

Plaintiffs argue that because MCL 484.2102(gg) provides that "[a] telecommunication service is not a public utility service[,]" New Par and Verizon's telecommunication services are not public utilities, and there can be no easement for their services as part of the easement for public utilities. However, because the deed is unambiguous, extrinsic evidence to determine intent may not be considered. *Dyball*, 260 Mich App at 704. Thus, MCL 484.2102(gg) is not applicable to this case as the intent of the drafter of the master deed, bylaws, and subdivision plan was set forth in the language used in those documents.

Plaintiffs also argue that New Par and Verizon are not public utilities, nor do they claim to be because they are not regulated by the Michigan Public Service Commission (MPSC). We agree that public utilities are regulated by the MPSC, MCL 460.6(1), and New Par and Verizon do not assert that they are public utilities under the statute. However, defendants argue that the language of the master deed and supporting documents reflect the intent for the public utility easement in the Villas to include all utilities. We agree. Accordingly, whether New Par and Verizon are public utilities regulated by the MPSC is not pertinent to this case. Further, although the trial court cited in its opinion, MCL 460.111(c) and MCL 460.701(d), both of which define a public utility, these provisions are also not relevant because the intent of the parties for the public utility easement to include all utilities was set forth in the master deed.

Next, plaintiffs argue that the trial court erred in relying on *Campanelli v AT&T Wireless Servs, Inc*, 85 Ohio St 3d 103; 706 NE2d 1267 (1999), because that case related to a particular Ohio statute. Importantly, in the trial court's opinion and order denying plaintiffs' motion for reconsideration, the trial court clarified that it "did not rely on *Campanelli* but merely consulted the conclusion of the Ohio Supreme Court on a similar question – although admittedly distinct in important respects – as a small and by no means integral part of its analysis." Based on the foregoing, the trial court did not rely on *Campanelli* in rendering its decision.

Plaintiffs further argue that the accessory building is inconsistent with the use of single-family residences, which is contrary to section VII of the bylaws. In addition, plaintiffs argue that the accessory building proposed in the lease is for storage of supplies, materials, and personal property, which is also contrary to section VII of the bylaws. As set forth above, the intent in the deed encompasses easements for telephone and telecommunications services. Moreover, the only evidence presented supports that the accessory building will house necessary equipment that is related to the wireless communications antenna. Thus, the accessory building

is not to be used for storage of supplies, material, or personal property, which is contrary to the bylaws. Further, based on the foregoing, the accessory building is consistent with the use of single-family residences because it provides the necessary equipment so that the residences of the Villas can have wireless communication services. Thus, the trial court's findings that the accessory building is not inconsistent with the use of single-family residences and that the accessory building contains equipment needed to service the antennae were not clearly erroneous.

Plaintiff next argues that the accessory building proposed in the lease is detrimental to the appearance of the Villas and is not consistent with the highest standards of a beautiful and serene residential community, which is contrary to article VII of the bylaws. These issues were not contained in the statement of questions presented. "An issue not contained in the statement of questions presented is waived on appeal." *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Regardless, these issues have no merit. Based on the description of the proposed accessory building, the fact that the building was to be landscaped with trees, and the fact that the accessory building was only 750 square feet, the trial court's conclusion essentially that the accessory building was not detrimental to the appearance of the Villas was not clearly erroneous. Moreover, to the extent that plaintiffs argue that the accessory building will not be consistent with the highest standards of a beautiful and serene residential community, the bylaws provision does not apply in this case because that provision relates only to the developers' rights throughout the construction and sales period.

Plaintiffs also argue that the plans and specifications for the accessory building have not been approved by the Association, which is contrary to article IX of the master deed. Because the construction of the accessory building has not commenced, this provision of the deed has not been violated because the plans and specifications only need to be approved before the building of the accessory building is commenced. Hence, plaintiffs' assertion that this provision has been violated has no merit. New Par, Verizon and Genoa Township will still need approval from the Association before the erection of the building.

In addition, plaintiffs argue that the Association cannot grant an easement for the tower and accessory building because the tower and accessory building are not necessary for the benefit of the Villas. This issue was not contained in the statement of questions presented. "An issue not contained in the statement of questions presented is waived on appeal." *English*, 263 Mich App at 459. Regardless, this issue has no merit. Because the plain and unambiguous intent expressed in the master deed was that the easement for public utilities includes telephone and telecommunications services, even those provided by private companies, whether the tower and accessory building are necessary for the benefit of the Villas does not need to be addressed by this Court.

Finally, plaintiff argues that New Par and Verizon cannot be given rights of way across property at the Villas for installation and maintenance. This issue was not contained in the statement of questions presented. "An issue not contained in the statement of questions presented is waived on appeal." *English*, 263 Mich App at 459. Regardless, this issue is without merit. Based on the plain language in the master deed as set forth in article VII, sections nine and eleven, New Par and Verizon may be granted rights of way across property at the Villas for installation and maintenance purposes. Accordingly, the trial court's finding that the master

deed authorizes the Association to grant easements for ingress and egress was not clearly erroneous.

Based on the foregoing, even viewing the evidence in a light most favorable to plaintiffs, we conclude there was no genuine issue of material fact that plaintiffs should be denied summary disposition pursuant to MCR 2.116(C)(10), that Genoa Township should be granted summary disposition pursuant to MCR 2.116(C)(10), and that New Par, Verizon, and the Association should be granted summary disposition pursuant to MCR 2.116(I).

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly